

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
HUNTINGTON**

**OHIO VALLEY ENVIRONMENTAL  
COALITION, INC. and WEST VIRGINIA  
HIGHLANDS CONSERVANCY, INC.,**

**Plaintiffs,**

**v.**

**Civil Action No. 3:07-cv-00413**

**APOGEE COAL COMPANY, LLC,**

**Defendant.**

**APOGEE COAL COMPANY, LLC'S MOTION TO  
STRIKE THE AFFIDAVIT OF DENNIS LEMLY**

Defendant Apogee Coal Company, LLC ("Apogee"), by counsel, hereby moves this Court for an order striking the testimony of Dr. A. Dennis Lemly contained in certain affidavits. Specifically, Apogee moves to strike an affidavit consisting of the report submitted to Plaintiffs by Dr. Lemly and included as an exhibit to Plaintiffs' Contempt Motion in this matter (Doc. 156-7) filed on April 18, 2010. Plaintiffs have withdrawn Dr. Lemly as a testifying expert witness at trial and thus any prior testimony proffered by him constitutes inadmissible hearsay. *See, e.g., Glendale Fed. Bank, FSB v. United States*, 90-772 C, 39 Fed. Cl. 422, 425 (Fed. Cl. 1997) ("Where an expert witness is withdrawn prior to trial . . . the prior [] testimony of that witness may not be used. That [] testimony is hearsay."); *Minebea Co., Ltd. v. Papst*, CIV.A. 97-0590 (PLF), 2005 WL 6271045 at \*1 (D.D.C. Aug. 2, 2005) (adopting analysis of *Glendale*). Consequently, this affidavit must be stricken.

Respectfully submitted,

APOGEE COAL COMPANY, LLC  
By Counsel

/s/ Blair M. Gardner

BLAIR M. GARDNER (WVSB # 8807)  
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**CERTIFICATE OF SERVICE**

I, Blair M. Gardner, do hereby certify that on July 26, 2010, I electronically filed the foregoing APOGEE COAL COMPANY, LLC'S MOTION TO STRIKE THE AFFIDAVITS OF DENNIS LEMLY with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Derek O. Teaney  
Joseph M. Lovett  
Appalachian Center for the Economy  
and the Environment  
P.O. Box 507  
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James M. Hecker  
Public Justice  
1825 K. Street, NW, Suite 200  
Washington, DC 20006

/s/ Blair M. Gardner